Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

PORTIA BASS,

Petitioner,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where Virginia has abolished all state remedies for employment discrimination, does the Virginia one year statute of limitations for defamation actions, Va. Code §8.01-247.1, violate equal protection, where its application with Title VII's jurisdictional requirement (42 U.S.C. §2000e5(f)(1), deprives a citizen of her state given remedy for defamation because the citizen is forced to submit to the Equal Employment Opportunity Commission's administrative procedures before acquiring the right to sue in federal court?

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PORTIA BASS,

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E.I. DUPONT DE NEMOURS AND COMPANY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Portia Bass (Bass), Petitioner, by counsel respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the Fourth Circuit.

OPINIONS BELOW

The order of the Court of Appeals, *Bass v. E.I. DuPont de Nemours and Co.*, No. 01-1073 (4th Cir. February 5, 2002), denying a rehearing en banc is unreported and set forth in App. -21-. The opinion of the Court of Appeals, *Bass v. E.I. DuPont de Nemours and Co.*, No. 01-1073, 2001 U.S. App. Lexis 474 (4th Cir. January 10, 2002), affirming the District Court's order is unpublished and set forth in App. -1-. The District Court's opinion and order, *Bass v. E.I. DuPont de Nemours and Co.*, No. 500CV:00064 (W.D. Va. December 15, 2000), ruling that Bass's defamation claim was barred by the statute of limitations is unreported and set forth in App. -11-, -19-.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 10, 2002. App. -1-. A timely petition for rehearing en banc was denied on February 5, 2002. App. -21-. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Because the proceeding draws into question the constitutionality of the mandatory administrative procedures of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e-5(f)(1) and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403 may be applicable. In addition, no court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403, certified to the Attorney General the fact that the constitutionality of 42 U.S.C. §5(f)(1) has been drawn into question.

Because the question presented draws into question the constitutionality of a statute of the Commonwealth of Virginia, namely Va. Code §8.01-247.1 and neither the Commonwealth of Virginia nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(b) may be applicable. This proceeding originated in a court of the United States as defined by 28 U.S.C. §451, namely the United States District Court for the Western District of Virginia Harrisonburg Division and said court did not certify to the Attorney General of Virginia, the constitutionality of Va. Code §8.01-247.1 has been drawn into question.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves U.S. Const. amend. XIV, U.S. Const. amend. V, 42 U.S.C. 2000e-5(f)(1), Va. Code Ann. §2.2-2639(D) (West 2001) formerly Va. Code Ann. §2.1-725, Va. Code Ann. §8.01-230, and (West 2001) Va. Code Ann. §8.01-247.1 (West 2001). The constitutional provisions and statutes are set forth in App. -23- through -30-.

STATEMENT OF THE CASE

Petitioner, Portia Bass, was employed with respondent from 1984 to 1999, when it fired her. She was a chemist with extensive experience as a chemical regulatory affairs specialist. The last seven years, she was the Global Lycra Toxic Substances Control Act Coordinator responsible for all the employer's Lycra domestic and international plants' compliance with the Toxic Substances Control Act (TSCA), 15 U.S.C. §2601 et seq. Plant employees on several plants, transportation personnel, the fire department, emergency response crews, and chemical vendors relied upon Bass to tell them that it was safe to handle a chemical, how to handle a chemical, what to do if a chemical was spilled or leaked, and the consequences if the chemical were handled improperly.

In July of 1998, Bass was summarily relieved from her position of Global Lycra TSCA Coordinator with no warning and demoted to a lesser position. When she asked for the reasons, the employer gave her none. After repeated requests to be given a reason for her demotion, one month later the employer finally gave Bass reasons, but admitted that no one in the company had ever mentioned these supposed deficiencies for the entire seven years, during which she directed the employer's

chemical regulatory compliance for the Lycra strategic business unit. A few short months later, the employer commanded Bass to resume her previous duties as Global Lycra TSCA Coordinator, while having no contact with the inexperienced biologist who had taken over the position and who was to retain the title and the position. Submission to the employer's request would have required Bass to certify the accuracy of hazardous chemical information to which she neither had access to nor knowledge of in violation of federal and state law. She refused to do so. As a direct consequence, Bass filed a charge with the Equal Employment Opportunity Commission (EEOC) on May 10, 1999. On June 16, 1999, the employer fired her.

On August 10, 1998, the Global Lycra Human Resources Manager wrote and disseminated a defamatory letter about Bass's ability to perform her duties as the Global Lycra TSCA Coordinator to 12 persons within the corporation. The letter was never given to Bass.

The EEOC mailed Bass a right to sue letter on May 18, 2000. The defamatory letter was attached as an exhibit to the employer's EEOC response. Bass became aware of the defamatory letter in July 2000, several weeks after she received her right to sue letter and only after she was forced to use extraordinary efforts to obtain the few items that remained in her EEOC file. On August 7, 2000, Bass filed a Title VII complaint with a state law defamation claim included.

The U.S. district court dismissed the defamation claim as barred by the one year statue of limitations of Va. Code §8.01-247.1. The U.S. Court of Appeals affirmed the dismissal and denied a rehearing.

REASONS FOR GRANTING THE WRIT

I.

The application of the jurisdictional requirements of Title VII together with Virginia's one year defamation statute of limitations deprives citizens of equal protection and due process under the law.

The mandatory administrative procedures of Title VII, 42 U.S.C. §2000e(f)(1), and Virginia's one-year statute of limitations for defamation, Va. Code Ann. §8.01-247.1 (West 2001), operate with one another to strip discrimination victims of their right to a remedy for defamation. The Commonwealth of Virginia gave each of its citizens a right of action to redress an injury to his or her reputation in the form of a defamation action. However, each citizen must act upon that right within one year from the date of the accrual of the defamation, which is the date the defamation occurred. Va. Code. Ann. §§8.01-247.1,8.01-230. Therefore, in order to act, the citizen must discover the defamation within one year.

The issue of equal protection and due process bursts forth, when an employee is defamed by her employer. In such a situation, the defamation claim will be attendant to a claim of employment discrimination. Yet, Virginia has abolished all state remedies for employment discrimination. Va Code Ann. §2.2-2639(D) (West 2001), formerly Va. Code. §2.1-725(D); *Mitchem v. Counts,* 259 Va. 179,185-86, 523 S.E.2d 246,249-50 (2000). Thus, Title VII is the employee's only redress. *Id.* However, the employee is prohibited from filing an action in court on her Title VII claims until she receives a right to sue letter from the EEOC. 42 U.S.C. §2000e-5(f)(1) (West 2001). The EEOC process necessarily takes at minimum one year. After the employee files a charge within 300 days from the discriminatory

acts, the employee cannot even request a right sue letter until 180 days have passed. 42. U.S.C. § 2000e-5e. Then there is another 90 day period in which the complaint will be filed. 42 U.S.C. §2000e-5(f)(1). At this point 570 days have passed; the one year statute of limitations has run. Because the employee's defamation claim is wrapped up in her Title VII claim, the citizen employee is left on the outside looking in. The employee has no right nor any means to compel the employer to reveal the defamation before filing suit. However, Title VII and Va. Code. Ann. §8.01-247.1 require the employee to do just that in order to preserve her right to seek redress for defamation. The only avenue to discover the defamation is via the discovery process of the Federal Rules of Civil Procedure. But, the employee cannot embark on discovery until she has filed her Title VII action in federal court, which will in all cases be after the one year statute of limitations has run, due to Title VII's requirement that the employee must first submit to its time consuming processes prior to seeking redress in court.

II.

The Statutory Framework of Virginia's Statute of Limitations and Title VII Deprived Bass of her Right to a Remedy for Defamation.

Virginia's one year statute of limitations for defamation actions and the elimination of all state remedies for employment discrimination claims, together with the one year statute of limitations' operation with Title VII's mandatory submission to the EEOC process requirement effectively blocked Bass from being able to seek a remedy for the employer's defamation of her professional reputation.

Bass began experiencing extreme difficulties at work, such as being demoted with no warning for reasons unknown to

anyone in the company until after her demotion, being ordered to resume the position from which she was demoted even though someone else was to retain the position, and being ordered to sign off on hazardous chemicals without verifying the information she was certifying to be true. Bass attributed her terrible plight to discrimination and took prompt action by filing the required charge with the EEOC. The Global Lycra Human Resources Manager's defamatory letter, disseminated to a several persons at several different company locations, about Bass was clearly related to the trouble being brought down upon Bass.

One year after Bass filed a charge, the EEOC finally issued her a right to sue letter. Several weeks later, Bass eventually received the sparse EEOC file. The defamatory letter was attached as an exhibit to the employer's EEOC response. Only at this time did Bass become aware of the letter. Within 90 days after the issuance of the right to sue letter, Bass filed a complaint in federal court including a claim for defamation. Had she been able to proceed directly to court, she would have filed suit in May of 1999 (the same time that she filed a charge with the EEOC), began discovery, and discovered the defamatory letter. At that time she could have filed an amended complaint and the defamation claim would have related back to the original complaint alleging employment discrimination.

In the instant case the defamatory letter was secretly published within the company. Thus, as Bass had no right to compel the employer to reveal the letter prior to filing an action in court, her only means to discover the letter was for the employer to tell her. It is contrary to logic and common sense to require a victim's remedy to depend upon the wrongdoer's voluntarily admission of its wrongdoing.

The one year limitations period for defamation actions should not apply to secretly published or otherwise inaccessible defamatory communications. *Semida v. Rice,* 863 F.2d 1156,1161 (4th Cir. 1988). Such application gives employers license to go about pouncing upon defenseless employees annihilating their careers and destroying their livelihoods with impunity. Bass had a defamation action against the employer because employers are liable for defamation committed by it employees, even if the defamation is against another employee. *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 334 S.E.2d 846 (1985). Furthermore, defamatory statements that are communicated to third parties, who are fellow employees that have no duty or interest in the subject matter, are not privileged. *Larimore v. Blaylock,* 259 Va. 568,574, 528 S.E.2d 119,122 (2000). As the defamatory letter about Bass was sent to several different employees each at a different location, intracorporate immunity does not apply to Bass's defamation claim. Moreover, Bass is entitled to an opportunity to prove that the recipients of the defamatory letters had no duty or interest in the subject.

The events alleged in Bass's complaint, that constituted the Title VII claims, involved the issues surrounding the defamatory letter and led her to file a charge of discrimination with the EEOC. Filing an Equal Pay Act claim would not have yielded up the defamatory letter because the letter is no way related to compensation information. On the Equal Pay Act claim, Bass would have been limited to discovery of compensation issues. Interrogatories and document production requests concerning the salaries would have produced titles and salary amounts that is clearly unconnected to a letter defaming Bass's reputation as a regulatory affairs chemist. Moreover, the defamation claim could not relate back under Fed. R. Civ. P. 15(c) because the letter did not arise from the same transaction or occurrence as the facts making up the Equal Pay Act. In

addition, filing a wrongful discharge claim produces the same result. Because a wrongful discharge claim cannot be based upon employment discrimination, such an action based upon violation of Virginia's Occupational, Safety, and Health Program (VOSH) would not arise out of the same transaction or occurrence as the defamatory letter. In the instant, case Bass was ordered to certify information about hazardous chemicals about which she had no knowledge, which is a crime under Va. Code Ann. §40.1-51.4:2. Discovery on whether the employer's command to Bass was in violation of VOSH.is unrelated to the defamatory letter. The sole cause of action that would have brought forth and been related to the defamatory letter is an employment discrimination action, which is unavailable in Virginia and available only after a substantial amount of time has passed in federal court.

III.

Virginia's One Year Defamation Statute of Limitations Is a Violation of Equal Protection as Applied to Employees Who Live in the Commonwealth.

Virginia's one year defamation statute of limitations, as applied to employees independent of Title VII, results in an unconstitutional violation of equal protection and a denial of due process. When a state gives its citizens a right, it must also provide a remedy for that right. For a right without a remedy is no right at all. Virginia created a right to a remedy for defamation. Then, the Commonwealth arbitrarily set a one year statute of limitations, which deprives a certain class of its citizens of the right to a remedy for defamation. Each citizen of Virginia is entitled to seek redress for an injury to her reputation. However, only employees defamed by their employers are left without a remedy. The Commonwealth failed to provide such employees with a means to discover, compel, or force the

employer to reveal the defamation.

The employee's plight is worsened by that fact that the employee must plead the defamatory words in haec verba to state a claim for defamation in state court. *The Federal Land Bank of Baltimore v. Birchfield*, 173 Va. 200,215 3 S.E.2d 405,410 (Va. 1939). Thus, the employee has to be aware of the defamation, in order to file an action alleging defamation because the exact words must be stated in the complaint. The employee cannot use official discovery procedures until the she files a complaint in state or federal court. But the employee cannot file a complaint alleging the defamation until she knows what the defamatory statements are. The relation back provisions of the Virginia and Federal Rules of Civil Procedure are of no assistance to the employee, because the only cause of action that would reveal the defamation is an employment discrimination action, for which there is no remedy in Virginia and the Federal remedy looms off in the distance beyond the one year statute of limitations, which the employee must meet. Therefore, the employee must be entitled to pre-complaint discovery on a yearly basis in order to have a remedy. Clearly, such a thing is unworkable. The right to a remedy for defamation must be restored to Bass and all employees, who live in Virginia.

IV.

The Issue, of the Application of Title VII's Administrative Procedures Together with a State Statute of Limitations for a State Cause of Action which is Inexorably Intertwined with a Title VII Claim, is a Question of First Impression.

This Court has not addressed the issue of the result of the operation of Title VII's mandatory requirement, that discrimination victims submit to its process prior to filing an action in court, with Virginia's one year statute of limitations for

defamation actions, which are tied to the employee's Title VII discrimination claim, where there is no state remedy for discirmination. No United States Court of Appeals or District Court has addressed the issue. In the instant case, the District Court and Court of Appeals' opinions conspicuously declined to address Bass's equal protection and due process arguments.

The effect of the application of the federal statute and the state statute of limitations disenfranchises an entire class of persons from a right to a state cause of action. Such an application has far reaching effects beyond petitioner in this case and concerns the fundamental meaning of equal protection and due process.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit disenfranchises an entire class of persons from equal protection and denies them due process of law. Therefore, Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fourth Circuit.

RESPECTFULLY SUBMITTED,

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